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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/833,314
Filing Date: April 10, 2001
Appellant(s): DUPONT ET AL.

Robert M. Barrett

For Appellant

EXAMINER'S ANSWER

This is in response to the Order Returning Undocketed Appeal of 09/833,314, mailed 1/9/09. The basis for the return was that the references to Henkel ('634) and Mandanas ('606), which were cited in the rejection set forth in the Examiner's Answer, were not listed in the Evidence Relied Upon section of the Answer. Upon review, the examiner discovered that Henkel ('634) and Mandanas ('606), while being withdrawn as

references (see page 4, para. 1 of the Answer), were nevertheless inadvertently left in the statement of the rejection (also page 4, para. 3 of the Answer). Accordingly, to set the record straight, the Examiner's Answer mailed 10/23/07 is hereby vacated and the revised Examiner's Answer, is substituted therefore. It is noted for the record that the only difference in the two Examiner's Answers is the deletion of Henkel ('634) and Mandanas ('606) from the statement of the rejection.

This is in response to the appeal brief filed 6/12/07 appealing from the Office action mailed 9/20/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

Appellants' statement of the status of amendments after Final Rejection is silent in this regard. In fact, no amendment after Final Rejection has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

Full translations of previously applied ERRASS, the two QP CORP patents, HOASHI, HONMA ET AL and SONOYA, are included and being mailed with the Answer. These references are not being relied on for any new teachings. These references are still being relied upon for the reasons of record as of the time of the Final Rejection; i.e., as further evidence to show the art taken as a whole is replete with examples of multi-phase food products wherein the phases are given various geometries and cross-sectional shapes.

EP 769,252	OHBA ET AL (Europ.)	4-1997
GB 341,760	VICKERS (G. Britain)	1-1931
WO 98/05219	MAY (WIPO)	12-1998
GB 1,327,351	QUAKER OATS (G. Britain)	8-1973
3,738,847	BECHTEL	6-1973
2,421,199	GUTMANN	5-1947
GB 2,194,125	FROEBEL (G. Britain)	3-1988

2,937,095	ZITIN	5-1960
3,385,712	DODGE ET AL	5-1968
2,344,901	ROUTH	3-1944
GB 1,583,351	McMAHON (G. Britain)	1-1981
EP 675,046	ERRASS (Europ.)	10-1995
AU 50797/96	HILLERBRAND	10-1996
JP59-31677	QP CORP	2-1984
JP61-100174	QP CORP	5-1986

Appellant's Admission of the Prior Art

5,518,746	DIAZ	5-1996
JP 62-104566	HOASHI (Japan)	5-1987
JP 59-159758	HONMA ET AL (Japan)	9-1984
JP 57-12987	SONOYA (Japan)	1-1982

Upon reconsideration, Henkel (GB 1486634) and Mandanas (WO 94/26606), employed in the Final Rejection, have been withdrawn as being superfluous.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohba et al (EP '252) in view of Vickers (GB '760) and May et al (WO'219), or vice versa, i.e., Vickers in view of Ohba et al and May et al, both further in view of Quaker Oats (GB '351), and Bechtel ('847), further in view of Gutmann ('199), Froebel et al (GB '125),

Zitin ('095), Dodge et al ('712) and, further in view of Routh ('901), McMahan (GB '351), Errass (Ep '046), Hillebrand (Austral. '797/96), QP Corp (Jp '677) and QP Corp (Jp '174), further in view of applicants admission of the prior art, further in view of Diaz(5,518,746), Hoashi (JP 62-104566), Honma et al (JP59-159758), and Sonoya (JP57-12987).

In regard to claim 1, Ohba et al (EP'252) discloses a canned pet food having an upper end and a lower end, wherein the pet food comprises two phases, which include protein and carbohydrate, and wherein the two phases have different appearances from each other because they are derived from substantially different materials and are shown that way in the figures. Claim 1 differs from Ohba et al essentially in the fact that claim 1 recites that the two phases are arranged such that there is an outer tubular phase which extends from the lower end to the upper end, and a substantially cylindrical inner phase, which extends from the lower end to the upper end of the outer phase, whereas Ohba et al discloses the phases are arranged adjacent to, but not in tubular/cylindrical shape. That is, claim 1 differs from Ohba et al only in the geometry of the phases. It is noted that appellant's disclosed reason to provide composite food products with phases of different composition and appearance, is to provide products having new and interesting appearances, (for either the pet or its owner?). Once it was known to provide a package with two or more different phases, the particular shape of the phases in the package is seen to have been an obvious matter of choice and/or design, especially in view of the fact that the art is replete with evidence of varying the cross sectional geometry of two or more phases, including tubular outer phases and

cylindrical inner phases. For example, as evidenced by Vickers, it was notoriously conventional to provide composite food products wherein the phases form an outer tubular phase and an inner cylindrical phase as recited. Vickers, for example, discloses the phases can be meat products, which differ from each other in their texture and appearance, with the outer phase confining a softer core filling. May et al can be relied on as further evidence of providing two composite food products, and specifically, pet food products, wherein there is an outer phase and an inner phase, and wherein both the outer phase and the inner phase includes an edible source of carbohydrate. May et al also teaches the composite two phased pet food product is canned, which, of course, is a notoriously conventional packaging expedient for all types of food; i.e., pet food or food destined for human consumption. As noted above, Appellant's primary disclosed reason for providing the composite product with the geometry of the phases is to provide two products, which contrast in appearance and/or texture, to provide new and interesting appearances. This is exactly the objective of May et al as well. Froebel et al, although teaching individual composite food pieces, nevertheless, further evidences that composite, concentric food products, such as pet foods, were well established in the art. To further evidence the conventionality of plural phase food products having an inner phase and a tubular outer phase, and to emphasize appellant is not the first to employ this specific geometric configuration in composite food products, Gutmann, Froebel et al, Zitin, and Dodge et al are relied on as further evidence that a tubular outer food phase and an inner core composite food phase is notoriously conventional. To modify Ohba et al and substitute tubular/cylindrical shaped phases for adjacent polygonal

shaped phases, for its art recognized and appellant's intended function of new and interesting appearances, is seen to have been an obvious matter of choice and/or design. McMahon, Hillerbrand et al, Errass, the two QP Corp references, Quaker Oats, Bechtel, Routh, Diaz, Hoashi, Honma et al, and Sonoya are all relied on as further evidence to show the art taken as a whole is replete with examples of multi-phase food products wherein the phases are given various geometries and cross-sectional shapes. Reference is made to *In re Gorman* 18USPQ2d,1886, wherein the Court noted that where teachings relied upon to show obviousness were repeated in a number of references, the conclusion of obviousness was strengthened.

As noted above, the claims are also rejected under 35USC103(a) over the same group of references, but employing Vickers as the primary reference. In this regard, Vickers teaches that composite foods, which are provided with different appearances between phases, imparts increased interest in the food. Vickers also teaches the recited geometry of the phases; i.e., an outer tubular phase within an inner cylindrical phase. Claim 1 differs from Vickers in the particular type of food, as well as the fact the composite food is canned. As fully detailed above, the art taken as a whole, including Ohba and May et al, disclose it was notoriously conventional to provide plural phase food products that can be food for pets or food for human consumption, and that it was also well established to can plural phase food products. To therefore modify Vickers and substitute one conventional composite food formulation for another conventional food formulation would have been an obvious function of who is to be the intended consumer

of the food, and to can the product for preservation and marketing, would also have been obvious in view of the art taken as whole.

In regard to claim 2, claim 2 essentially recites all the limitations of claim 1 and then further recites the process of making the recited canned pet food product. Thus, claim 2 is rejected for all of the reasons given above in regard to claim 1. In regard to the product by process language in claim 2, how the phases were formed in the container is not seen to be limiting on the recited article, which is a canned pet food. The final article is a canned, dual phase pet food with an outer, tubular phase and a cylindrical inner phase, wherein both phases include carbohydrate and protein and have been heated, which article is shown to have been obvious in view of the art taken as a whole. In any case, Routh clearly evidences the fact that it was well established to fill a container with a first outer phase food product and then form a bore(s) in the outer phase, and fill the bore(s) in the outer phase with a second inner phase food product. In regard to claim 3, which recites that the outer phase is a thermally gelled mixture, the art taken as a whole, including Ohba, Vickers and May et al evidence the fact that it was conventional, and thus obvious, to include a gelling agent in one or both of the phases to form a gelled mixture, with May et al and appellant's admission of the prior art, specifically teaching thermally gelled pet food compositions and formulated emulsion pet food compositions, in the recited orientation. Thus, May et al and appellant's admission of the prior art evidence that it would have been obvious to employ chunks of a formulated emulsion product in a gravy (claim 4), that it would have been obvious to employ phases within the recited volume range relative to each other (claim 5), and that

it would have been obvious to provide a moisture content within the recited range (claim 8). Claim 6, an article claim, is rejected for the reasons given above. Claims 11-13,15 and 17, which are essentially duplicates of claims 3-5 and 8, and which recite compositions and volume relationships between phases, are rejected as having been obvious for the reasons given above. See, especially, in this regard, May et al, who, as noted above, disclose the composition and volume relationships recited. In regard to claims 9 and 10, which recite a method for producing a canned pet food product, as discussed above, the art taken as a whole, including Ohba et al, Vickers, May et al and Routh, disclose it would have been obvious to fill a can to provide an outer tubular phase and an inner cylindrical phase, wherein the phases include carbohydrate and protein, and the process employs forming a bore in the outer phase and filling the bore. In regard to claims 7,14 and 16, which recite that the product has a height at least as large as its diameter, the art taken as a whole discloses this dimensional relationship is, of course, conventional. See, for example, in this regard, McMahon, Quaker Oats and Bechtel. To modify the combination and provide the product such that the height is at least as large as its diameter is seen to have been an obvious matter of choice and/or design in view of the art taken as a whole.

(10) Response to Argument

All of appellant's urgings have been fully and carefully considered but are not found to be convincing. Appellant's urgings begin on page 12 of the Brief. On page 12 of the Brief, it is noted that the way the rejection is phrased, makes the rejection difficult to address. The Brief particularly notes the use, in the rejection, of the phrase "or vice

versa", and the Brief also alleges that there is no principal reference. These urgings are not convincing and are also inaccurate. The statement of the rejection is perfectly clear, as is the explanation of the rejection, which has been fully and clearly detailed. The "or vice versa" phrase is clearly explained in the statement of the ground of rejection. Thus, there should be no confusion in the statement of the rejection that the claims are rejected over Ohba et al in view of Vickers and May et al or Vickers in view of Ohba et al and May et al, both further in view of the secondary art. Also, there should be no confusion in the fact that there are two rejections, both relying on the same group of references for evidence of obviousness and that there are indeed two "principal" or primary references – Ohba et al in the first rejection and Vickers in the second rejection. Also, it is not seen why the number of references provides any confusion, since the rejection clearly explains how the references are being applied. The invention is directed to canned pet foods, wherein the pet food is provided in the cans in two discernible phases with specific geometries. The rejections rely on overwhelming evidence that whether a food product is produced for pet or human consumption, the art is replete with examples of providing plural discernible phases having various geometries including the recited shapes. On pages 12-15 of the Brief, each reference is argued separately as if it were applied alone, in a vacuum. The discussion of the references does not address the rejections, which rejections are based on what the art taken as a whole teaches and how the references are applied in the rejections. The references are not applied separately under 35USC102(b), anticipation, but rather under 35USC103(a), obviousness. The analysis in the Brief of each reference does not

address how the reference fits into the rejections, which rely on both Ohba et al and Vickers as separate primary references. For example, in the discussion of May et al, it is urged that several of the other applied references teach away from a combination of either reference with May et al. However, May et al has not been relied on as a primary reference, so that the comparison to May et al is not relevant to the rejections. Also, beside the fact, these urgings are not directed to the rejections which employ Ohba et al and Vickers as separate primary references, these urgings also are inaccurate. For example, May et al is not being relied on for the specific recited geometry of the phases (i.e., an outer tubular phase and an inner cylindrical phase). This conventional geometry is evidenced by other references as detailed above. Nevertheless, May et al does disclose that the two discernible pet food phases (which contain the recited compositions and the recited volume relationships) can be provided such that the recess, which is formed in one phase, which is then filled with a second phase, can extend entirely through the base. Thus, May et al does disclose an outer and inner two phase, retorted canned pet food, whose shape and appearance is disclosed as providing "new and interesting textures and appearances, to further stimulate consumer interest". This, of course, is appellant's reason for providing two discernible phases and geometry.

In analyzing each of the rest of the applied references in the Brief, in an attempt to show that the references are either not combinable, or there is no suggestion to combine, or teach away, etc., the urgings make the same errors made in discussing May et al. That is, the urgings are not directed to how the references have been applied.

Although it would not appear that no one reference, individually, specifically teaches all of the elements, i.e., the recited food composition with the recited geometry with the recited can, as noted above, this issue only addresses novelty under 35USC102(b), and not obviousness under 35USC103(a). The fact is, that the art, taken as a whole, teaches that it was conventional to provide composite, multiphase foods in general, that have the recited geometry/shape, wherein the composite foods are disclosed as being packaged or not packaged; that it was conventional to provide composite, multiphase pet foods with the recited composition in retort cans; that it was conventional to provide shaped, composite multiphase pet foods in a can wherein one phase surrounds a second phase; and that it was conventional to provide composite, multiphase foods in general, with the recited geometry/shape in a can. The analysis of each reference in the Brief overlooks what the reference is being relied on to show and overlooks what is already disclosed in either the primary reference or other secondary references. For example, the remarks urge that one or more of the secondary references do not show, for example, the recited shape of the multiphase product in a can, or the recited shape with the recited composition. The remarks are replete with this type of urging, wherein it is urged that a particular reference does not teach one or more recitations, which recitations are already shown and evidenced by another reference relied upon in the rejection. Thus, and not to belabor this point too much, a secondary reference, which teaches a composite, multiphase food in a can does not have to teach the specific recited composite multiphase food composition for the rejection to be proper, when the specific composite multiphase food composition is already taught in another reference.

The fact is, there appears to be nothing magic in placing a multiphase pet food of specific shape/geometry in a can, especially when it was conventional to place multiphase pet foods in cans; when it was conventional to place other multiphase foods having the same specifically, recited shape in cans; when it was conventional to provide the specifically recited multiphase composition in cans; and when it was conventional to generally provide the specifically recited shape/geometry for multiphase foods in general. The urgings emphasize a specific shape or geometry for the two phases, which shape or geometry is shown by the art taken as a whole to be a notoriously conventional multiphase structure or design or pattern; which structure, design or pattern achieves no new or unexpected result. The result put forward is a new or interesting appearance, but the art taken as a whole clearly evidences the fact that the appearance is not new, and the art taken as a whole recognizes that appearance is advantageous in foods, whether the food is to be marketed as pet foods or food for human consumption.

Finally, on page 16, it is urged that the canned pet food of Appellant's invention has the advantage of being "suitable" for use in larger cans, where the height of the can is at least as large as the diameter of the can. It is then urged that in taller cans filled with a product such as the one disclosed by May et al, the upper and base layers would be more difficult to shake out into the pet's bowl or dish. As discussed in a previous Office action, this urging is merely an opinion, not supported by any factual, probative evidence. Also, the urging is vague. For example, how much "more difficult" would it be to shake the product into a bowl or dish? Also, Quaker Oats and Bechtel disclose

composite dual phase pet food products, wherein the outer phase is a ground meat based mixture, and wherein the pet food is packaged in a tall can, which is at least as large as the diameter of the can. Finally, in this regard, since it appeared that May et al and the present application had the same assignee, and May et al was silent as to the recited dimensional relationship between product height and product diameter, previous Office actions, noting that May et al was silent in this regard, made enquiries as to the dimensional relationship between these two dimensions in May et al. However, these enquiries were never addressed by appellant.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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